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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CLIFTON ALLEN TURNER, Defendant and Appellant.	E034505 (Super.Ct.No. FWV 25588) OPINION

APPEAL from the Superior Court of San Bernardino County. Frederick A. Mandabach, Judge. Affirmed.

Patrick J. Hennessey, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, James D. Dutton, Supervising Deputy Attorney General, and Scott C. Taylor, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Clifton Allen Turner, Jr. appeals judgment entered following a jury conviction for felony child abuse (Pen. Code, § 273a, subd. (a)).[1] The jury also found true the allegation that defendant personally inflicted great bodily injury on the victim. (§ 12022.7, subd. (d).) Defendant admitted a strike prior (§§ 667, subd. (e)(1), 1170.12, subd. (c)(1)). The trial court sentenced him to 19 years in state prison.

Defendant contends the trial court abused its discretion (1) in allowing the prosecution to show the jury a videotape of the victim and (2) in not excusing a juror after the juror complimented the prosecutor on his trial performance. We find no abuse of discretion and affirm the judgment.

1. Background Facts

When S. was three months old, S. was the victim of child abuse, in which she sustained severe brain damage and became comatose. Her doctors believed she suffered from what is commonly referred to as the "shaken baby syndrome." At the time of trial, about eight months after the abuse, S. remained in a vegetative state.

S. is defendant's daughter. She was born in March 2002. Her mother, who is defendant's wife, remained hospitalized after S.'s birth and was unable to care for S. due to suffering from a brain hemorrhage during S.'s birth. Father took care of S. and her two-year-old sister and four-year-old brother. Until May 2002, S.'s aunt, Nancy W., took care of the three children during the day. During that time, S. was healthy and happy. Thereafter S. ate less, frequently cried and was fussy more often.

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[1] Unless otherwise noted, all statutory references are to the Penal Code.

On June 24, 2002, defendant took S. to the emergency room at San Antonio Community Hospital in Upland, California. Dr. Larry Potts examined S. He observed she was limp, pale, and barely breathing. She had a bruise on the right forehead area. She did not cry, move, or look around. A CAT scan revealed bone fractures. During a physical examination of S., Dr. Potts discovered several bruises on her body. Due to S.'s critical condition, Dr. Potts sought assistance in treating S. from the Loma Linda University Pediatric Intensive Care Unit.

Dr. Farrukh Mirza, a pediatric internist, met Dr. Potts at the San Antonio Community Hospital emergency room and examined S. S. was comatose and had a breathing tube, which was hooked up to a ventilator. The bruise on her forehead was bulging and she appeared to have internal injuries in the stomach area. X-rays and the CAT scan showed a large amount of fluid and swelling around the brain, indicating it occurred within the last few hours. S.'s retina area was full of blood. There was also evidence of healing rib fractures. In Dr. Mirza's opinion, S.'s injuries were indicative of shaken baby syndrome, which had occurred on more than one occasion. According to Dr. Mirza, shaken baby syndrome occurs when there is rapid movement of an infant's brain back and forth, causing blood vessels to tear. There was also evidence of healing rib fractures. Dr. Mirza last saw S. when she was six or seven months old. At that time S. was in a permanent vegetative state, unable to see, hear or swallow.

Police Detective Latimer spoke to defendant at the hospital while S. was being treated. Defendant spoke without emotion and did not ask how S. was doing. Defendant

said S. had had a sore throat the night before and, when he woke up at 8:00 a.m., he heard S. gurgling and noticed she was not breathing. He attempted CPR and then took her to the hospital.

Police detective Robert Galindo also reported to the hospital on June 24, 2002. He observed S.'s injuries and spoke to defendant. Defendant agreed to go with him to the police department to discuss the matter. Before interviewing defendant, Galindo advised defendant of his *Miranda* rights, which defendant waived.

During the videotaped interview, defendant said S. had been ill and had not been eating well for some time. The night before she had vomited. In the morning S. was gasping and wheezing. Defendant had attempted CPR on her and then ran to get help from a neighbor who was a nurse. The neighbor, Carmella Allen, told defendant to take S. to the hospital immediately. Defendant did so.

When Galindo asked defendant if he could explain how S. became injured, defendant said S.'s two-year-old sister might have hit her in the head with a toy or been rough with her. When Galindo asked defendant about shaking S., defendant initially denied shaking her but later in the interview admitted he had gotten frustrated with S. crying and had shaken S., while yelling at her, on two occasions but stopped when he noticed her head snapping back and forth.

Susan Ward, a nurse at Casa Colina Hospital where defendant's wife was receiving rehabilitation care, testified that in June 2002 defendant visited his wife at Casa Colina Hospital. S. was with him. Defendant appeared stressed and admitted feeling

overwhelmed by his situation, in which he was solely responsible for caring for his three children.

Dr. Clare Sheridan-Matney, a pediatrician at Loma Linda University Children's Hospital and expert in child abuse, testified she examined S. in June 2002 and again in February 2003, at which time S. was videotaped to indicate her level of functioning. Dr. Sheridan-Matney testified that when she first visited S., she was in a coma, had numerous bruises on her body, was on a ventilator, and had suffered significant brain injury. In Dr. Sheridan-Matney's opinion, S. not only had recent injuries but also had multiple old injuries. These injuries were not, in Dr. Sheridan-Matney's opinion, caused by her siblings or by accident. Dr. Sheridan-Matney testified concerning the three-minute videotape of S. taken in February 2003.

Carmella Allen testified she had known defendant for three years. When she first saw S., she was not eating well and would not cry. Allen never saw any suspicious marks on S. She recalled defendant bringing S. to her in June and telling Allen something was wrong with S. Allen did not know what was wrong so she told defendant to take S. to the emergency room.

2. Admissibility of Videotape

Defendant contends the trial court abused its discretion in allowing the People to present to the jury a three-minute videotape of S. taken almost eight months after the charged child abuse.

Prior to trial, defendant's moved to exclude the videotape as highly prejudicial. The trial court denied the motion on the grounds the videotape was probative in establishing that defendant inflicted great bodily injury and the video's probative value outweighed the prejudicial effect of showing it to the jury.

In an attempt to avoid admission of the videotape at trial, defense counsel offered to stipulate to great bodily injury in the event the jury found defendant committed the child abuse. The prosecutor refused to stipulate, and the court stated it could not force the People to do so.

During Dr. Sheridan-Matney's trial testimony, the prosecutor showed the jury the videotape. The video was taken during Dr. Sheridan-Matney's examination of S. in February 2003. It showed S.'s current condition and level of functioning.

Defendant argues the trial court abused its discretion in allowing the videotape under Evidence Code section 352. He claims the video was highly inflammatory and superfluous since doctors and the police testified to S.'s condition and the video was taken long after the abuse. We disagree. The video was probative not only in establishing that S. suffered great bodily injury, but also the severity and nature of her condition depicted in the video refuted defendant's contention that S.'s condition was attributable to normal disease or, alternatively, a sibling, rather than defendant, caused S.'s injuries. The seriousness of her condition also refuted defendant's claim that her injuries were accidental; that he did not realize that shaking S. would cause such serious injuries and therefore he did not have criminal intent.

There is no question the videotape was relevant. The issue here is whether it should have been excluded under Evidence Code section 352 as more prejudicial than probative, particularly in light of defendant's willingness to stipulate to great bodily injury.

It is well established that "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." (Evid. Code, § 352.) The trial court retains broad discretion in determining whether evidence is admissible under Evidence Code section 352. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 496.)

The videotape was not gruesome or unduly inflammatory, and the record shows that the trial court properly weighed its probative value and prejudicial effect. The court did not abuse its discretion under Evidence Code section 352 in concluding the probative value of this evidence was not substantially outweighed by its prejudicial effect.

Defendant contends that his willingness to stipulate to great bodily injury, nullified or greatly diminished the probative value of the videotape. "But 'If the facts to which the defendant has offered to stipulate retain some probative value, then evidence of such facts may be introduced.'" (*People v. Kaurish* (1990) 52 Cal.3d 648, 684, quoting *People v. Hall* (1980) 28 Cal.3d 143, 152.) Furthermore, the video need not be excluded as cumulative if offered to prove facts established by testimony. (*People v. Scheid* (1997) 16 Cal.4th 1, 14.)

As the California Supreme Court explained in *People v. Scheid, supra,* 16 Cal.4th at pages 16-17, the prosecutor is not obliged to "'"'"accept antiseptic stipulations in lieu of photographic evidence. . . .' [Conventional evidence, as contrasted with a stipulation, 'tells a colorful story with descriptive richness. . . . This persuasive power of the concrete and particular is often essential to the capacity of jurors to satisfy the obligations that the law places on them.']; [Citations.] ['The general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness.'].)"'"'

In this case, the court could reasonably conclude that the video retained probative value apart from the proposed stipulated fact that S. suffered great bodily harm. The video was important in assisting the jury in weighing the plausibility of defendant's defenses.

It not only established that S. suffered great bodily injury but also corroborated doctors' testimony regarding the seriousness of S.'s injuries and supported testimony that a child could not have caused S.'s condition, the injuries were intentional, and perpetrator's treatment of S. could not have been accidental. Thus, the videotape was properly admitted since it had probative value beyond the parameters of defendant's proffered stipulation and was not unduly gruesome or inflammatory.

Even if the trial court erred in admitting the video, such error was not prejudicial. It is not probable the verdict would have been any different had the jury not viewed the video of S. in her vegetative state. The doctors' testimony describing S.'s injuries

already engendered great sympathy for the infant. (*People v. Scheid, supra,* 16 Cal.4th at p. 20.) While we conclude there was no abuse of discretion in allowing the video, even if there was error, it was harmless. (*People v. Watson* (1956) 46 Cal.2d 818, 836; *People v. Scheid, supra,* 16 Cal.4th at p. 21.)

3. Juror Removal

Defendant contends the trial court should have excused juror No. 2 (Juror 2) because, after the jurors had begun deliberations, Juror 2 briefly spoke to the prosecutor on the way back to the courtroom after lunch. Juror 2 approached the prosecutor and said, "Hey, I like your style." The prosecutor told the juror, "I can't talk to you." Juror 2 again said, "I like the way you are in court." Again, the prosecutor said, "I can't talk to you," and continued walking. The prosecutor immediately advised defense counsel and the court of the incident.

When the court asked defense counsel if there was anything in particular the court should ask Juror 2, defense counsel said "no" but suggested excusing the juror and replacing him with an alternate juror. The court said it would not excuse Juror 2 based on what it had just heard. The prosecutor stated that he believed the court should question the juror regarding the matter. When the court inquired as to defense counsel's view, defense counsel stated that he had voiced his concerns and submitted on the matter.

The trial court briefly questioned Juror 2 regarding the incident. Juror 2 told the court he saw the prosecutor in the parking lot and "just wanted to thank him and wanted to tell him that I liked his delivery and his style of practicing his law." Juror 2 said the

prosecutor told him not to talk to him. Juror 2 did not indicate his thinking on the case to the prosecutor. His comment was simply a benevolent gesture, which he would have also made to defense counsel, had he had the opportunity. He did not mention the encounter to the other jurors.

After the court questioned Juror 2, defense counsel told the court he had no reason to disbelieve the prosecutor or the juror regarding their contact. The court concluded that replacing Juror 2 was unnecessary and unjustified based on the nature of Juror 2's relatively innocuous comments to the prosecutor and his answers to the court's questions.

Defendant argues that Juror 2's comments to the prosecutor indicated the juror was impressed with the attorney and biased in favor of the prosecution, with a predisposition to convict defendant.

The People argue defendant waived the juror misconduct issue by not requesting Juror 2 removed after the court questioned Juror 2 regarding the encounter. (*People v. Goff* (1981) 127 Cal.App.3d 1039, 1046.) We disagree. Defense counsel sufficiently objected to Juror 2's communication with the prosecutor and suggested removing the juror. Defense counsel was not required to repeat his objection after submitting on the matter. On the merits, however, we conclude the trial court did not abuse its discretion in allowing Juror 2 to remain on the jury panel.

Section 1089 provides, in relevant part: "If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, or upon other

good cause shown to the court is found to be unable to perform his or her duty . . . the court may order the juror to be discharged . . . ." (See also Code Civ. Proc., § 233.)

"A trial court's decision whether good cause exists to excuse a juror or to discharge a jury is within its discretion. The court's decision will be upheld on appeal if there is any substantial evidence to support it." (*People v. Mincey* (1992) 2 Cal.4th 408, 467, citing *People v. Burgener* (1986) 41 Cal.3d 505, 520.)

"Neither section 1089 nor Code of Civil Procedure section 233 define 'good cause.' It is clear to us, however, that a juror's serious and wilful misconduct is good cause to believe that the juror will not be able to perform his or her duty. Misconduct raises a presumption of prejudice [citations], which unless rebutted will nullify the verdict." (*People v. Daniels* (1991) 52 Cal.3d 815, 864.)

Here, we find no such substantial evidence of good cause to believe Juror 2 would not properly perform his duty. There was no serious and willful misconduct, and certainly no misconduct that affected the deliberations. Juror 2's brief encounter with the prosecutor appears to have been merely Juror 2's attempt to compliment the prosecutor on his performance in court. There was no discussion regarding the case; the prosecutor did not respond to Juror 2's comments, other than to advise Juror 2 not to talk to him; and Juror 2 informed the court he would have complimented defense counsel as well had he had the opportunity to do so. Juror 2 apparently was impressed with the judicial proceedings and the manner in which the participants conducted themselves, and merely attempted to convey this to the prosecutor, who happened to be nearby.

Under such circumstances, the trial court did not abuse its discretion in allowing Juror 2 to remain on the jury panel. The record shows there was an absence of good cause justifying his removal.

4. Disposition

The judgment is affirmed.

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s/Gaut
J.

We concur:

s/Hollenhorst
Acting P. J.

s/Ward
J.